

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ADRIENNA H.,¹
Plaintiff

v.

KILOLO KIJAKAJI, Acting
Commissioner of Social Security,
Defendant.

Case No. 2:22-cv-05487-GJS

**MEMORANDUM OPINION AND
ORDER**

I. PROCEDURAL HISTORY

Plaintiff Adrienna H. (“Plaintiff”) filed a complaint seeking review of the decision of the Commissioner of Social Security denying her application for Supplemental Security Income (“SSI”). The parties filed consents to proceed before the undersigned United States Magistrate Judge [Dkts. 12 and 21] and briefs [Dkts. 17 (“Pl. Br.”), 20 (“Def. Br.”) & 23 (“Reply”)] addressing disputed issues in the case. The matter is now ready for decision. For the reasons set forth below, the

¹ In the interest of privacy, this Order uses only the first name and the initial of the last name of the non-governmental party.

1 Court finds that this matter should be affirmed.

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3 **II. ADMINISTRATIVE DECISION UNDER REVIEW**

4 Plaintiff filed an SSI application on July 30, 2016, alleging disability
5 beginning March 23, 2015. [Dkt. 14, Administrative Record (“AR”) 99, 268-73.]
6 Plaintiff’s application was denied at the initial level of review and on
7 reconsideration. [AR 99, 197-201, 203-08.] A hearing was held before
8 Administrative Law Judge Elizabeth R. Lishner (“the ALJ”) on January 31, 2019.
9 [AR 99, 113-51.]

10 On May 3, 2019, the ALJ issued an unfavorable decision applying the five-
11 step sequential evaluation process for assessing disability. [AR 99-108]; *see* 20
12 C.F.R. § 416.920(b)-(g)(1). At step one, the ALJ determined that Plaintiff had not
13 engaged in substantial gainful activity since July 30, 2016, the application date.
14 [AR 101.] At step two, the ALJ determined that Plaintiff has the following severe
15 impairments: degenerative disc disease of the lumbar spine; opioid and
16 benzodiazepine use disorder; major depressive disorder; and factitious disorder.
17 [AR 101.] At step three, the ALJ determined that Plaintiff does not have an
18 impairment or combination of impairments that meets or medically equals the
19 severity of one of the impairments listed in Appendix I of the Regulations. [AR
20 102]; *see* 20 C.F.R. Pt. 404, Subpt. P, App. 1. The ALJ found that Plaintiff has the
21 residual functional capacity (“RFC”) to perform light work, as defined in 20 C.F.R.
22 § 416.967(a), except she can only perform work that can be completed by the end of
23 the day, is limited to occasional postural activities, reaching overhead with the
24 bilateral upper extremities, and contact with co-workers and supervisors, and is
25 precluded from climbing ladders, ropes, and scaffolds, exposure to unprotected
26 heights, heavy machinery and hazards, public contact, and fast-paced assembly
27 lines. [AR 103.] At step four, the ALJ determined that Plaintiff has no past relevant
28 work. [AR 107.] At step five, the ALJ determined that Plaintiff is capable of

1 making a successful adjustment to other work that exists in significant numbers in
 2 the national economy, including work as an electronics worker, packager, and
 3 sorter. [AR 107-08.] Based on these findings, the ALJ concluded that Plaintiff was
 4 not disabled since the application date, July 30, 2016. [AR 108.]

5 The Appeals Council denied review of the ALJ's decision on May 11, 2020.
 6 [AR 15-21.] This action followed.

7 Plaintiff raises the following issues challenging the ALJ's findings and
 8 determination of non-disability:

- 9 1. The ALJ erred in finding that opioid and benzodiazepine use disorder
 10 was a severe impairment and the Appeals Council failed to properly
 11 address newly submitted evidence.
- 12 2. The ALJ failed to properly evaluate the medical evidence.
- 13 3. The ALJ erred in determining that Plaintiff can perform other work that
 14 exists in significant numbers in the economy and the ALJ erred in assessing
 15 Plaintiff's RFC.

16 The Commissioner asserts that the ALJ's decision is supported by substantial
 17 evidence and should be affirmed.

18 **III. GOVERNING STANDARD**

19 Under 42 U.S.C. § 405(g), the Court reviews the Commissioner's decision to
 20 determine if: (1) the Commissioner's findings are supported by substantial
 21 evidence; and (2) the Commissioner used correct legal standards. *See Carmickle v.*
 22 *Comm'r Soc. Sec. Admin.*, 533 F.3d 1155, 1159 (9th Cir. 2008); *Brewes v. Comm'r*
 23 *Soc. Sec. Admin.*, 682 F.3d 1157, 1161 (9th Cir. 2012). "Substantial evidence ... is
 24 'more than a mere scintilla' ... [i]t means – and only means – 'such relevant
 25 evidence as a reasonable mind might accept as adequate to support a conclusion.'"
 26 *Biestek v. Berryhill*, 139 S. Ct. 1148, 1154 (2019) (citations omitted); *Gutierrez v.*
 27 *Comm'r of Soc. Sec.*, 740 F.3d 519, 522 (9th Cir. 2014) ("[s]ubstantial evidence is
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1 more than a mere scintilla but less than a preponderance”) (internal quotation marks
2 and citation omitted).

3 The Court will uphold the Commissioner’s decision when ““the evidence is
4 susceptible to more than one rational interpretation.”” *Burch v. Barnhart*, 400 F.3d
5 676, 681 (9th Cir. 2005) (quoting *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir.
6 1989)). However, the Court may review only the reasons stated by the ALJ in the
7 decision “and may not affirm the ALJ on a ground upon which he did not rely.”
8 *Orn v. Astrue*, 495 F.3d 625, 630 (9th Cir. 2007). The Court will not reverse the
9 Commissioner’s decision if it is based on harmless error, which exists if the error is
10 “inconsequential to the ultimate nondisability determination, or that, despite the
11 error, the agency’s path may reasonably be discerned.” *Brown-Hunter v. Colvin*,
12 806 F.3d 487, 492 (9th Cir. 2015) (internal quotation marks and citations omitted).

13 IV. DISCUSSION

14 A. Step Two and New Evidence Submitted to the Appeals Council

15 1. Step Two

16 Plaintiff contends the ALJ erred at step two in finding that opioid and
17 benzodiazepine use disorder was a severe impairment. [Pl. Br. at 6-7; AR 101.]

18 At step two, “an impairment is found not severe ... when medical evidence
19 establishes only a slight abnormality or a combination of slight abnormalities which
20 would have no more than a minimal effect on an individual’s ability to work.”
21 *Yuckert v. Bowen*, 841 F.2d 303, 306 (9th Cir. 1988); *Smolen v. Chater*, 80 F.3d
22 1273, 1290 (9th Cir. 1996) (“the step-two inquiry is a de minimis screening device
23 to dispose of groundless claims”).

24 Here, there was sufficient evidence to sustain the ALJ’s finding that opioid
25 and benzodiazepine use disorder was a severe impairment. [AR 101, 416.] In April
26 2017, following an examination of Plaintiff, Dr. Gunaratnam opined that opioid and
27 benzodiazepine use disorder was “likely,” noting that Plaintiff admitted she had
28

1 misused benzodiazepine (Xanax) and was not taking other medications previously
2 prescribed. [AR 416-17.] Thus, substantial evidence supports the ALJ's step two
3 determination.

4 Additionally, Plaintiff has failed to show that she was harmed by the alleged
5 error at step two. When a disability claim involves substance abuse, the ALJ must
6 first conduct the general five-step sequential evaluation without determining the
7 impact of the substance abuse on the claimant. *See Bustamante v. Massanari*, 262
8 F.3d 949, 955 (9th Cir. 2001); 20 C.F.R. § 416.935 ("If we find that you are
9 disabled and have medical evidence of your drug addiction or alcoholism, we must
10 determine whether your drug addiction or alcoholism is a contributing factor
11 material to the determination of disability."). If the ALJ finds that the claimant is
12 not disabled under the five-step inquiry, the analysis proceeds no further and the
13 claimant is not entitled to benefits. *See Bustamante*, 262 F.3d at 955. But if the
14 ALJ finds that the claimant is disabled under the five-step inquiry and there is
15 evidence of drug addiction or alcoholism, the ALJ should determine if the claimant
16 would still be disabled if she stopped using drugs or alcohol. *Id.*; 20 C.F.R. §
17 416.935.

18 Here, the ALJ determined that Plaintiff was not disabled at step five of the
19 sequential analysis. [AR 99-108.] Given this finding of nondisability, the ALJ did
20 not consider whether substance abuse was a contributing factor material to
21 Plaintiff's alleged disability. Thus, any arguable error in finding that opioid and
22 benzodiazepine use disorder was a severe impairment was harmless. *See Brown-*
23 *Hunter*, 806 F.3d at 492.

24 2. New Evidence

25 Plaintiff contends that the Appeals Council failed to properly consider or
26 acknowledge new medical evidence submitted after the ALJ rendered the decision.
27 [Pl. Br. at 6-8; AR 22-53.]

28 The Appeals Council "will review a case if ... [it] receives additional evidence

1 that is new, material, and relates to the period on or before the date of the hearing
2 decision, [] there is a reasonable probability that the additional evidence would
3 change the outcome of the decision,” and there is “good cause” for not submitting
4 the new evidence earlier. 20 C.F.R. § 416.1470(a)(5), (b). If the Appeals Council
5 fails to properly “consider” new and material evidence that satisfies the
6 requirements of section 416.1470, a remand for further administrative proceedings is
7 appropriate. *See Taylor v. Comm’r of Soc. Sec. Admin.*, 659 F.3d 1228, 1233 (9th
8 Cir. 2011).

9 The Ninth Circuit distinguishes between new evidence that the Appeals
10 Council formally “considered” and exhibited in the record and evidence that the
11 Appeals Council merely “looked at” but did not exhibit in the record. *See Amor v.*
12 *Berryhill*, 743 F. App’x 145, 146 (9th Cir. 2018). Evidence “considered” by the
13 Appeals Council becomes part of the administrative record, as “evidence upon
14 which the findings and decision complained of are based” and must be considered
15 by the Court “when reviewing the Commissioner’s final decision for substantial
16 evidence.” *Brewes*, 682 F.3d at 1162-1163; *Amor*, 743 F. App’x at 146 (“[W]e may
17 review evidence submitted to and considered by the Appeals Council as part of the
18 administrative record.”). But when the Appeals Council only “looked at” the new
19 evidence and concluded it did not meet the standard for consideration under section
20 416.1470, the new evidence does “not become part of the record” and the Court
21 “may not consider it.” *Amor*, 743 F. App’x at 146.

22 Plaintiff submitted to the Appeals Council medical records, dated September
23 16, 2016 through August 27, 2019, which were not included in the record before the
24 ALJ. [AR 22-72, 78-95, 152-78.] The Appeals Council did not consider or exhibit
25 any of the new medical records, but it looked at and offered reasons for dismissing
26 some of the new records. [AR 16.] The Appeals Council stated:

27 You submitted medical records from Blue California dated
28 January 25, 2019 to March 26, 2019 (29 pages). We find

1 this evidence does not show a reasonable probability that it
2 would change the outcome of the decision. We did not
3 exhibit this evidence.

4 You submitted medical records from Blue California dated
5 May 21, 2019 to August 27, 2019 (18 pages). The [ALJ]
6 decided your case through May 3, 2019. This additional
7 evidence does not relate to the period at issue. Therefore,
8 it does not affect the decision about whether you were
9 disabled beginning or on before May 3, 2019.

10 If you want us to consider whether you were disabled after
11 May 3, 2019, you need to apply again.

12 [AR 16.]

13 Plaintiff contends that it was error for the Appeals Council to fail to mention
14 or offer any reasons for disregarding 30 pages of new medical records pertaining to
15 treatment from September 16, 2016 through December 28, 2018. [Pl. Br. at 7-8; AR
16 22-53.] However, this Court “may not consider” these records, as the Appeals
17 Council’s decision shows that it did not consider or exhibit the new evidence in the
18 record. *Amor*, 743 F. App’x at 146; [AR 16]. While the Appeals Council did not
19 indicate that it looked at the records at issue, “the Appeals Council [was] not
20 required to make any particular evidentiary finding” when rejecting new evidence
21 presented after the ALJ’s unfavorable decision. *Gomez v. Chater*, 74 F.3d 967, 972
22 (9th Cir. 1996); *see also Palomares v. Astrue*, 887 F. Supp. 2d 906, 915-16 (N.D.
23 Cal. 2012) (“the sufficiency of the Appeals Council’s perfunctory explanation” for
24 rejecting the treating physician’s opinion “will not be considered as a grounds for
25 reversal”). Moreover, Plaintiff has failed to show there is a “reasonable probability”
26 that the new evidence would impact the decision denying benefits or that there was
27 “good cause” for not submitting the evidence earlier. *See* 20 C.F.R. §
28 416.1470(a)(5), (b). Consequently, Plaintiff fails to demonstrate that she is entitled
to reversal or remand based on the Appeals Council failure to address the new

evidence. *See* 20 C.F.R. § 416.1470.

B. Medical Evidence

Plaintiff contends the ALJ erred by attributing “little weight” to the opinion of her treating physician, Jos Santz, M.D. [Pl. Br. at 8-13; AR 106-07.]

Under the pre-2017 regulations that apply to Plaintiff’s claim, treating medical sources are generally given more weight than non-examining sources due to a treating physician’s heightened familiarity with a claimant’s condition. *See* 20 C.F.R. § 416.927(a)(2); *Lester v. Chater*, 81 F.3d 821, 830-31 (9th Cir. 1995) (superseded by statute on other grounds) (distinguishing among three types of physicians: (1) treating physicians (who treat a claimant), (2) examining physicians (who examine but do not treat a claimant), and (3) non-examining physicians (who do not examine or treat a claimant). “When presented with conflicting medical opinions, the ALJ must determine credibility and resolve the conflict.” *Batson v. Comm’r of Soc. Sec. Admin.*, 359 F.3d 1190, 1195 (9th Cir. 2004).

If a treating physician’s opinion is not “well-supported by medically acceptable clinical and laboratory diagnostic techniques” or is “inconsistent with the other substantial evidence in [the] case record,” the ALJ need not give it controlling weight. 20 C.F.R. § 404.1527(c)(2); *see also Tonapetyan v. Halter*, 242 F.3d 1144, 1149 (9th Cir. 2001) (“When confronted with conflicting medical opinions, an ALJ need not accept a treating physician’s opinion that is conclusory and brief and unsupported by clinical findings.”). If medical evidence contradicts a treating physician’s opinion, the ALJ must provide ““specific and legitimate reasons’ supported by substantial evidence in the record” for rejecting that physician’s opinion. *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir. 1998) (quoting *Lester*, 81 F.3d at 830); *see also Orn*, 495 F.3d at 631 (explaining that when rejecting a treating physician’s opinion, “the ALJ must do more than offer his conclusions. He must set forth his own interpretations and explain why they, rather than the doctors’, are correct.”).

1 Dr. Santz was Plaintiff's treating physician for various musculoskeletal and
2 other complaints. [AR 105.] In February 2019, Dr. Santz completed an assessment
3 of Plaintiff's ability to do work-related activities. [AR 525-30.] Dr. Santz found
4 that Plaintiff could lift and carry less than 10 pounds, sit less than two hours in an
5 eight-hour workday, and stand and walk less than two hours in an eight-hour
6 workday. [AR 525.] Dr. Santz also reported that Plaintiff uses a cane or walker to
7 ambulate, has environmental restrictions and impaired ability to reach, handle,
8 finger, feel, push/pull, kneel, crawl and ambulate, is precluded from performing
9 postural activities (twisting, stooping, crouching, and climbing stairs and ladders),
10 would be absent from work about three times a month due to her impairments and
11 treatment, and must be able to walk around every 45 minutes for 10 minutes at a
12 time, shift at will from sitting or standing/walking, change positions after sitting or
13 standing five minutes, and lie down every 20 minutes. [AR 525-29.]

14 The ALJ found that the "extreme limitations" described in Dr. Santz's
15 assessment were not supported by the objective medical record. [AR 105-06.] The
16 ALJ noted that "mild" medical imaging findings of Plaintiff's spine and "normal"
17 EMG and NCV studies of Plaintiff's left upper extremity contradicted Dr. Santz's
18 assessment. [AR 102, 105, 107, 337, 339, 508, 511, 519.] The ALJ also noted that
19 a June 2016 x-ray of Plaintiff's cervical spine was unremarkable, except for
20 straightening of the cervical lordosis and there were no physical therapy treatment
21 notes or imaging records of Plaintiff's right knee. [AR 102, 105, 339.] An ALJ
22 may discredit a treating physician's opinion that is unsupported by the record as a
23 whole or by objective medical findings. *Batson*, 359 F.3d at 1195; *Tonapetyan*, 242
24 F.3d at 1149; *see also Kohansby v. Berryhill*, 697 F. App'x 516, 517 (9th Cir. 2017)
25 ("objective findings such as MRI and x-ray reports and treatment notes support the
26 rejection of [the treating doctor's] opinion that [the claimant] could not perform
27 'sedentary work'"); *Lopez v. Berryhill*, No. 1:17-CV-01501-BAM, 2019 WL
28 1325862, at *6 (E.D. Cal. Mar. 25, 2019) (ALJ's finding that treating doctor's

1 opinion was contradicted by “mild degenerative findings on imaging” was a specific
2 and legitimate reason for discounting doctor’s opinion).

3 The ALJ also questioned whether Dr. Santz’s treatment notes accurately
4 reflected Plaintiff’s condition at the time of her examinations. [AR 105, 107.] The
5 ALJ found that many of Dr. Santz’s records contain language that appeared to have
6 been copied and pasted repeatedly, which cast doubt on the reliability of Dr. Santz’s
7 opinion and Plaintiff’s reports of extreme musculoskeletal pain. [AR 105, 107.]
8 The ALJ also noted that Dr. Santz relied on Plaintiff’s complaints of pain and
9 reported side effects from medications in prescribing Norco, an opioid, even though
10 Plaintiff failed to follow through with various treatment recommendations. [AR
11 102, 105, 453, 505.] As the record supports the ALJ’s decision to discount
12 Plaintiff’s subject symptom testimony, it was reasonable for the ALJ to disregard
13 Dr. Santz’s opinion to extent it was premised on Plaintiff’s subjective complaints.²
14 *See Tonapetyan*, 242 F.3d at 1149; *Fair v. Bowen*, 885 F.2d 597, 605 (9th Cir.
15 1989).

16 Plaintiff further claims that the ALJ erred in evaluating the opinion of the
17 examining physician, Dr. Kumar. [Pl. Br. at 13.] However, Dr. Kumar was not able
18 to complete Plaintiff’s evaluation or assess Plaintiff’s functional limitations due to
19 Plaintiff’s poor cooperation during the examination. [AR 519.] Because Dr. Kumar
20 did not have the opportunity to review Plaintiff’s treatment records supporting some
21 physical limitations, the ALJ assigned “some weight” to Dr. Kumar’s opinion. [AR
22 106.] Plaintiff has failed to demonstrate that the ALJ erred in the evaluation of Dr.
23 Kumar’s opinion or that she was harmed by the alleged error.

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28 ² Plaintiff does not appear to challenge the ALJ’s rejection of her subjective complaints.

C. Other Work and RFC

1. Overhead Reaching Limitation

Plaintiff contends that the reaching demands of the alternative jobs identified by the vocational expert exceed her abilities. [Pl. Br. at 13-14.]

At step five, the Commissioner has the burden of establishing, through the testimony of a vocational expert or by reference to the Medical-Vocational Guidelines, that the claimant can perform alternative jobs that exist in substantial numbers in the national economy. *See Tackett v. Apfel*, 180 F.3d 1094, 1101 (9th Cir. 1999); *Bruton v. Massanari*, 268 F.3d 824, 827 n.1 (9th Cir. 2001). When using the testimony of a vocational expert at step five, “the VE must identify a specific job or jobs in the national economy having requirements that the claimant’s physical and mental abilities and vocational qualifications would satisfy.” *Osenbrock v. Apfel*, 240 F.3d 1157, 1162-1163 (9th Cir. 2001).

The Commissioner “routinely relies” on the Dictionary of Occupational Titles (“DOT”) “in evaluating whether the claimant is able to perform other work in the national economy.” *Terry v. Sullivan*, 903 F.2d 1273, 1276 (9th Cir. 1990); *see Pinto v. Massanari*, 249 F.3d 840, 845 (9th Cir. 2001) (“[T]he best source for how a job is generally performed is usually the [DOT].”). Should an “apparent or obvious” conflict arise between a VE’s testimony regarding the claimant’s ability to perform alternative jobs and the DOT’s description of those jobs, “the ALJ must ask the expert to reconcile the conflict” and determine whether the VE’s explanation is reasonable before relying on the VE’s testimony. *Gutierrez v. Colvin*, 844 F.3d 804, 807-08 (9th Cir. 2016); *see Massachi v. Astrue*, 486 F.3d 1149, 1153-1154 (9th Cir. 2007) (“[T]he ALJ must first determine whether a conflict exists. If it does, the ALJ must then determine whether the vocational expert’s explanation for the conflict is reasonable and whether a basis exists for relying on the expert rather than the [DOT].”).

Plaintiff correctly asserts that the DOT classifies each of the three jobs

1 identified by the vocational expert as requiring “frequent reaching,” that is, reaching
2 from one-third to two-thirds of the time. [Pl. Br. at 14]; *see* DOT 726.687-010
3 (electronics worker); DOT 726.687-042 (packaging); DOT 222.687-014 (garment
4 sorter). Plaintiff contends that because she is limited to occasional overhead
5 reaching with the bilateral upper extremities and “the DOT does not delineate
6 between overhead or outward reaching,” a conflict exists between the vocational
7 expert’s testimony that she is able to perform the three alternative jobs and the
8 DOT’s description of those jobs. [Pl. Br. at 13-14.]

9 Plaintiff has failed to establish any apparent or obvious conflict between the
10 vocational expert’s testimony and the DOT. “While ‘reaching’ connotes the ability
11 to extend one’s hands and arms ‘in any direction,’ [] not every job that involves
12 reaching requires the ability to reach overhead.” *Gutierrez*, 844 F.3d at 808
13 (internal quotation marks omitted) (holding that no apparent or obvious conflict
14 existed between the vocational expert’s testimony a claimant who could not reach
15 above shoulder level with her dominant right arm could perform the DOT job of
16 cashier, which requires “frequent reaching,” ... [g]iven how uncommon it is for
17 most cashiers to have to reach overhead”); *Ballesteros v. Colvin*, No. CV 15-0543-
18 JPR, 2016 WL 3381280, at *15 (C.D. Cal. June 13, 2016), *judgment entered*, No.
19 CV 15-0543-JPR, 2016 WL 3398397 (C.D. Cal. June 13, 2016) (“But just because
20 the term ‘reaching’ includes extending the arms in ‘any’ direction—such as up,
21 down, out, right and left,—that does not mean that a job that involves reaching
22 necessarily requires extending the arms in all of those directions.”). Moreover, there
23 is nothing in the DOT’s job descriptions of the three jobs identified or in the record
24 suggesting that more than occasional overhead reaching would be required. *See*
25 DOT 726.687-010 (stating that an electronics worker cleans, trims, or prepares
26 components or parts for assembly by other workers); DOT 726.687-042 (stating that
27 the sealer, semiconductor packaging position involves sealing solder-coated lids or
28 tops on semiconductor packages, using heated chuck or automatic furnace, and

maintaining production records); DOT 222.687-014 (stating that a garment sorter sorts finished garments according to lot and size numbers recorded on tags and labels attached to garments, may fold and package garments in boxes and bags, and may iron garments). As no apparent or obvious conflict exists between the VE’s testimony and the DOT, the ALJ did not err in failing to inquire about or resolve any conflict. *See Gutierrez*, 844 F. 3d at 808 (an ALJ must “ask follow up questions of a vocational expert when the expert’s testimony is either obviously or apparently contrary to the [DOT], but the obligation doesn’t extend to unlikely situations or circumstances.”).

2. Number of Available Jobs

Plaintiff challenges the vocational expert’s testimony regarding the number of alternative jobs available. [Pl. Br. at 15.] The vocational expert testified there were 35,000 electronic worker positions, 80,000 packager positions, and 60,000 sorter jobs available in the national economy. [AR 108, 146-47.] Plaintiff claims that the vocational expert’s testimony was unreliable and in conflict with information from SkillTRAN’s Job Browser Pro software. [Pl. Br. at 14-16.]

The Ninth Circuit has recognized that an ALJ may have a duty to address “a conflict between the [vocational expert’s] job-number estimates and the claimant’s job-number estimates.” *Wischmann v. Kijakazi*, 68 F.4th 498, 505 (9th Cir. 2023). However, “[t]hat duty arises only where the purportedly inconsistent evidence is both significant and probative, as opposed to ‘meritless or immaterial.’” *Id.* (quoting *Kilpatrick v. Kijakazi*, 35 F.4th 1187, 1193-94 (9th Cir. 2022)).

Here, Plaintiff failed to preserve her challenge to the vocational expert’s job-number estimates by objecting at the hearing or submitting evidence of the Job Browser Pro job-number estimates to the Appeals Council to be included in the record. *See Wischmann*, 68 F.4th at 506. Moreover, Plaintiff has not presented any significant or probative evidence to rebut the vocational expert’s testimony. *Id.* at 505. Plaintiff merely claims that the Job Browser Pro software suggested a lower

1 number of positions available in the national economy for the electronics worker,
2 packager, and sorter jobs, without offering any evidentiary support. [Pl. Br. at 14.]
3 Plaintiff's "bare assertions," without more, "do not give rise to the material
4 inconsistency that the ALJ is required to resolve." *Wischmann*, 68 F.4th at 507-08.

5 Plaintiff also complains that the vocational expert did not address whether the
6 limitation to occasional overhead reaching would reduce the number of jobs
7 available in the economy. [Pl. Br. at 15.] However, the ALJ's hypothetical question
8 to the vocational expert adequately addressed all of Plaintiff's limitations, as set
9 forth in the RFC. [AR 103, 146-47.] In response to the hypothetical, the vocational
10 expert eliminated jobs that would have required more than occasional reaching
11 overhead with the bilateral upper extremities and estimated the number of
12 electronics worker, packager and sorter jobs that were available in the economy.
13 [AR 146-47.] The vocational expert's "recognized expertise" provided "the
14 necessary foundation" for his testimony regarding the number of relevant jobs in the
15 national economy. *Bayliss v. Barnhart*, 427 F.3d 1211, 1218 (9th Cir. 2005).
16 Accordingly, substantial evidence supported the ALJ's finding that Plaintiff could
17 perform jobs that exist in significant numbers in the economy. *See id.* ("An ALJ
18 may take administrative notice of any reliable job information, including
19 information provided by a VE.") (citing *Johnson v. Shalala*, 60 F.3d 1428, 1435 (9th
20 Cir. 1995)).

21 3. RFC

22 Plaintiff contends that the RFC assessed by the ALJ failed to include her use
23 of a cane and walker, as prescribed by Dr. Santz. [Pl. Br. at 15-16.] However, as
24 discussed above, the ALJ properly discounted Dr. Santz's opinion. Thus, the ALJ
25 had no obligation to account for Dr. Santz's opinion in the RFC. *See Batson*, 359
26 F.3d at 1197 ("the ALJ was not required to incorporate evidence from the opinions
27 of [the claimant's] treating physicians, which were permissibly discounted" in
28 determining the claimant's RFC).

V. CONCLUSION

For all of the foregoing reasons, **IT IS ORDERED** that the decision of the Commissioner finding Plaintiff not disabled is **AFFIRMED**

IT IS SO ORDERED.

DATED: June 20, 2023



GAIL J. STANDISH
UNITED STATES MAGISTRATE JUDGE